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Issue date: 16Jul2002

Case No: **2001-LHC-2330**

OWCP No: **14-102404**

In the Matter of:

GARY NITSCHKE,
Claimant,

v.

**COASTAL TANK CLEANING/
AIAC,**
Employer/Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**
Party-In-Interest.

DECISION AND ORDER

This proceeding arises from a claim filed under the provision of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Seattle, Washington on December 12, 2001 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS¹

¹ The following abbreviations will be used as citations to the record:
JS - Joint Stipulations;

The Claimant and the Employer have stipulated to the following:

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;
2. An Employer/Employee relationship existed at all relevant times;
3. The Claimant sustained work related injuries;
4. The Claimant is entitled to temporary total disability from January 25, 1990 through May 22, 1991
5. The Claimant has 5% impairment of each knee pursuant to the AMA guidelines.

Issues

1. Average weekly wage.
2. Date of maximum medical improvement.
3. Authorization of treatment by Dr. O'Neill.
4. Nature and extent of disability.
5. Section 8(f) relief.

Contentions

The Claimant, through counsel, states that in January 1990, he

was injured when he fell 20 feet inside a tank, landing on his feet and striking his knees on the curved inside wall of the tank on the U.S.S. Nimitz. He hit the side of his arm, as well as his hip (pelvis), on the side of a baffle.

TR	-	Transcript of the Hearing;
CX	-	Claimant's Exhibits; and
EX	-	Employer's Exhibits.

Following this injury, he was in immediate pain, from the waist down, including his low back as well as some pain in the area of his prior injury (neck & shoulder). (TR 30). He had a scrape on his arm. (TR 32). He was originally taken to the Navy Hospital in an ambulance. They X-rayed his pelvis, sutured his knees, gave him some pain medication and sent him home on crutches in a taxi. (TR 35-36). Unfortunately, the evaluation and treatment records from that visit were not preserved.

Nitschke saw numerous physicians in 1990 and Dr. Mandt performed surgery in November of that year. He continued with Dr. Mandt until February 1991 and was told to follow up with Dr. O'Neill. Counsel states that

The carrier has suggested care with Dr. O'Neil was unauthorized and that the referral was initiated by Claimant's prior counsel. The record shows that the Carrier controverted medical treatment on July 6, 1990 and again on January 20, 1993. Following the carrier's controversion, Claimant was free to seek treatment on his own.

Dr. O'Neill saw the Claimant some 34 times over a ten year period. This physician stated that

He had through the course of the 10 years I saw him consistent complaints of soft tissue and joint pain and on examination he consistently had tightness in his muscles of his back and his legs and that really never changed significantly... But he certainly remained limited in his range of motion consistently with me over that time frame. So it wasn't as if one might say he was giving me one performance one day and another performance the other.

The Employer states that

Briefly, the issues as raised by the parties are:

1. Causation: The Employer contends claimant's current complaints are unrelated to the 1990 accident, while claimant contends that the pain he experiences in virtually every part of his body is causally connected.

2. Nature and Extent of Disability: The Employer contends claimant reached maximum medical improvement on May 22, 1991 and has no loss of wage earning capacity. Claimant would have the Court believe that his lack of work during the past ten years is due to the 1990 injury and that he has yet to recover from this accident.
3. Unauthorized Change of Physician/Necessity of Medical Treatment: The Employer contends the evidence proves that claimant's treatment with Dr. Mary O'Neill was never authorized. Claimant disagrees with this position.
4. Average Weekly Wage: The Employer contends claimant's average weekly wage is \$207.94, while the claimant asks for an average weekly wage of \$652.50.
5. Section 8(f) Relief: The Employer contends that claimant suffered from preexisting conditions which combined with his 1990 injury and resulted in a greater degree of impairment than would have otherwise arisen.

The Employer notes that

This claim has lain dormant before the Office of Workers' Compensation Programs since 1993, when claimant did not pursue the claim. (EX 1.5). During this past year, claimant engaged the services of another attorney, David Condon, and decided to pursue benefits one more time.

Evaluation of the Evidence

In January 1990, the Claimant reported that he fell on his knees several days ago. An X-ray of the left knee was negative except for soft tissue swelling. An X-ray of the pelvis was normal. (EX 1).

In early February 1990, Nitschke told Dr. Ambur that his knee lacerations had been cleaned and sutured at a naval hospital. The physician removed the sutures. (CX 2).

In late February 1990, Nitschke informed personnel at Highline Community Hospital that Dr. Ambur stated that he could return to work. Nitschke currently reported pains in the back and in the groin. Dr. Hawkins diagnosed acute contusions of the knees, and acute lumbar and thoracic strain. In April, an MRI revealed a tear of the right medial meniscus. (CX 3).

In March 1990, Dr. Kay was informed that Nitschke had back pain due to an injury in 1988 and as a result of the recent fall. Impressions included back pain with no objective findings. Dr. Kay stated that Nitschke could return to full duty with a restriction on kneeling. (CX 4). Dr. Ratcliffe saw Nitschke on several occasions. (CX 5).

Dr. Mandt performed surgery on each knee in November 1990. In May 1991, Dr. Mandt reported that the Claimant's

back has continued to hamper his physical therapy somewhat and he is being followed by Dr. O'Neill for this.

Later that month, Dr. Mandt reported that

Although he feels that there has been some slow, continued change in his status, I would have to say that based on objective findings, his condition has stabilized and no further treatment is indicated from our standpoint. He should continue on a home exercise program p.r.n. for the knees and continue to follow up with Dr. Mary Kay O'Neill for his back. (CX 6).

In January 1991, Dr. O'Neill stated that Nitschke had been referred by his then counsel and that he was being followed by Dr. Mandt. Reportedly, heavy lifting in 1988 produced pain in the right upper extremity and in the abdominal wall and back. (See EX 3 & 4).

Nitschke indicated that since the fall on his knees in 1990, he had had low back pain, hip pain, and knee and ankle pain. Examination revealed that Nitschke was very tense with marked muscle guarding behavior. The assessment was

No evidence of neuropathic pain or evidence of herniated nucleus pulposus with radicular findings. There is marked muscle guarding behavior throughout the upper back, right shoulder, neck region, as well as the lower back. Also tenderness in the ankles bilaterally and crepitus in the right hip.

In October 1991, Dr. O'Neill agreed that there was no primary mechanical defect in the knees. This physician continued to treat Nitschke and in January 1992 she reported that he had developed a somatiform pain disorder. Dr. O'Neill recommended a pain program. This physician treated Nitschke on numerous occasions during the 1990s.

In February 2001, Dr. O'Neill stated that

I believe that his knee injury primarily occurred at the time of his fall as well as his low back injury. I do believe his fall aggravated the pre-existing right shoulder injury and upper back injury. I am sure that this fall worsened those conditions.

In March 2001, Dr. O'Neill reported

In terms of what is related to Mr. Nitschke's 20-foot fall inside the tank on board ship where he landed on his knees, on a more probable than not basis, this fall injured his knees and his back which has continued to give him difficulties ever since the time of the injury. I think it would be difficult to understand how somebody could fall that far, hit a solid surface, injure his knees to the point that they required surgical treatment, and how that might occur to an individual without causing significant force to be applied to the low back. (CX 8).

David Fordyce, PhD, provided psychological treatment from 1994 to 1997. In May 1996, Dr. Fordyce stated that Nitschke was mildly disabled with a combination of a personality disorder and a learning disability. (CX 10). Nitschke received physical therapy on several occasions at Virginia Mason Medical Center. (CX 11).

Dr. Billett began treating Nitschke in 1999. Examination in November of that year revealed good range of motion of the hips and knees and there was no tenderness in the back. (CX 12).

When deposed in November 2001, Dr. Billett testified that he was a family physician and first saw Nitschke in September 1999. The initial impression was history of chronic pain. The physician would not approve numerous jobs due to chronic pain and mental health issues. (CX 18).

Dr. O'Neill was deposed in late 2001 and testified that she provided services to Nitschke as a member of the department of

physical medicine and rehabilitation at Virginia Mason. While the physician saw him many times she was never the treating physician as his funding for treatment was never secure.

When asked about objective findings, Dr. O'Neill stated that

He had through the course of the 10 years I saw him consistent complaints of soft tissue and joint pain and on examination he consistently had tightness in his muscles of his back and his legs and that really never changed significantly. (CX 19).

A FICA earnings record, printed in June 1993, shows earnings of

1988	\$ 14,189.97	
1989	\$ 10,813.01	
1990	\$ 2,727.50	
1991	----	(EX 18)

In November 2001, the Claimant signed an affidavit certifying the above earnings. (EX 19). The Claimant has furnished earnings records. (EX 13).

In July 1998, a Social Security Administration ALJ granted disability benefits to Nitschke from January 24, 1990. The Judge held that Nitschke met the listing of impairment in sections 12.07 (somotiform disorders) and 12.08 (personality disorders) in 20 CFR, Part 404. (CX 14).

On June 14, 1990, Nitschke filed a form LS 203 with OWCP. CX 15 contains other DOL forms with the last being a January 1993 Employer's notice of controversion of medical care.

EX 1 consists of DOL forms including the one in January 1993. In April 1993, the District Director informed both counsel then of record that

Dear Mr Warns: (cc to Claimant's counsel)

This will acknowledge your letter of 4/14/93. We have already had an informal conference where we basically recommended in the employer/carriers favor and no new evidence have been submitted.

Therefore I do not see the point of holding another conference.

Since it appears the claimant does not intend to pursue his claim, so we have closed our file administratively and I would suggest you do the same.

At the request of the Employer, Dr. Levine, an orthopedic surgeon, examined Nitschke in August 1991. Nitschke reported

That both knees bother him, but the right is worse than the left. He has a constant aching pain in the knee. At times he has sharp pain. These occur in both knees, but the right is greater than the left. Both kneecaps are tender to touch. His motion in his left knee is okay. The right knee has limited motion unless he forces it all the way which is uncomfortable. He notes that his right knee collapses on a daily basis. He feels that the strength is decreased in both knees, but it is worse on the right than the left. He notes tingling in little patches around both knees.

He does indicate in his pain diagram that he is having discomfort in his neck and upper back, as well as both thighs, as well as both feet, and he attributes all of these complaints to his on-the-job injury of January 24, 1990. These back complaints include the lower back as well.

Dr. Levine stated that

On today's examination, there were no significant objective findings noted on examination of the knees other than the patient's arthroscopy wounds which were well-healed. The patient still has numerous subjective complaints regarding his knees, for which no objective evidence could be found. He also complains now of generalized spine discomfort and thinks that this was related to his injury, although medical records do not corroborate this.

There is no further treatment, medical or surgical, for his knees I could recommend that I feel would be beneficial. This condition appears to be fixed and stable.

Regarding the knees specifically, he is capable of working on a reasonably continuous basis and, based upon objective findings, this would be without restriction.

He continues to have subjective complaints regarding his knees, and does not feel that he will be able to work.

Based upon the objective findings today, there was no evidence of any ratable impairment regarding either knee. (EX 14).

Dr. Vandenbelt, a psychiatrist, evaluated Nitschke in November 2001. Major diagnoses were a depressive disorder and a personality disorder. This physician was deposed in December 2001. (EX 21 and 25).

Dr. Brooks, an orthopedic surgeon, reviewed records and evaluated Nitschke in November 2001. Clinical data indicated that

Mr. Nitschke was reportedly employed as a carnival laborer from 1982 to 1989, sporadically as a cook from 1984 to 1990, and as a molder at Morel Foundry from 1988 to 1989. He began working for Coastal Coatings in October 1989, and then Coastal Tank in January of 1990. His jobs at Coastal included laborer, sandblaster, and painter. The work involved variable amounts of standing, walking, crawling, climbing, squatting, crouching and lying, up to 10 hours a day, seven days a week. It also required variable amounts of bending, climbing, lifting, twisting, reaching above shoulder, pulling, and "getting into the tightest smallest place and staying holding a heavy hose or painting [sic]." The maximum weight he had to lift or carry was between 50 to 100.

Following examination, Dr. Brooks stated, in part

Furthermore, assuming there was a 20 foot fall, arrested primarily by impacts on anterior knees, it would be implausible to conclude the claimant had no residual whatsoever therefrom. Consistent with the AMA Guides, Mr. Nitschke probably has 5% impairment of each lower extremity, or 5% permanent partial scheduled disability of left and right legs to use terminology consistent with the Longshore and Harbor Workers' Compensation Act. (EX 23).

The Claimant has submitted a March 1999 deposition of Dr. Brooks which was taken in another case. (CX 20).

When deposed in November 2001, Dr. Williamson-Kirkland testified that his speciality was physical medicine rehabilitation. The physician evaluated Nitschke in June 2001 and found gait and examination of the knees to be normal. (EX 24).

At the hearing, Nitschke discussed working for the carnival and indicated that he worked in the foundry for nine months. Then about six months later, he went to work for Coastal Coating/Coastal Tank. He was there for three months when he fell into a tank in January 1990. At that time, he had pain from the waist down as well as in the low back and the neck. He also scraped his arm.

Claimant's counsel asked Nitschke

Q During the three months or so that you worked there, were you working eight hour days?

A I was working ten hours on the average. That was my duty, ten hours a day, seven days a week. Sometimes it was more. I really didn't look at my hours. I started looking at them towards the end. I don't know if I can say this in court here, but they still owe me six hours. So, it's even more than ten hours. But the average is ten

Q And seven days a week typically?

A Seven days a week. (TR 33).

After the accident, he had difficulty walking and had low back pain. Nitschke stated that

I think Dr. Mandt was the one that referred me to Dr. O'Neill. It wasn't an attorney. It was Dr. Mandt's office or it may have been Dr. Mandt himself said, "Call one of these doctors over at the pain medicine clinic and go and get some treatment for your back or follow up there. " And Dr. O'Neill was the one I got hooked up with. (TR 42).

Nitschke reported that the carrier cut off longshore compensation in March 1991. (TR 45).

Merrill Cohen, a vocational rehabilitation counselor, prepared a report (EX 20), and testified at the hearing.

Dr. Brooks testified that he spent some 2 and a half hours with Nitschke and that there were no objective findings of disability. (TR 163 & 173).

Average Weekly Wage (AWW)

Claimant's counsel argues that Section 10(c) of the Act should be used to calculate the AWW as Nitschke

did not work "substantially" all of the prior 52 weeks. He had left the carnival work behind and moved into the foundry sometime prior to his injury. (He worked in the foundry for nine months, had six months off and then worked for Coastal for 14-15 weeks prior to the injury.) His more stable work pattern after leaving the seasonal carnival work, demonstrates an ability to maintain a higher weekly wage over time. He unfortunately had a six months period of no work, just prior to starting with Coastal. His leaving the foundry job was voluntary, wanting to leave workers who were smoking "pot" and harassing him. His work for Coastal was significant for the amount of overtime he was working. He was there approximately 15 weeks and his minimum week was 39 1/2 hours, with many weeks with substantial overtime. His longest week was 77 hours, during which he had earnings of \$955.00. Claimant submits that his actual earnings with Coastal Tank and Coastal Cleaning (the wage records seem to be a combination of his earnings with both), would best demonstrate his average weekly wage under §10(c). Accordingly, his AWW should be calculated at \$630 based on his earnings of \$9135.50 over the 14 1/2 weeks prior to his injury, with a corresponding compensation rate of \$420.00.

The Employer states that

Section 10(c) of the Act is applied to calculate a claimant's average weekly wage if the other methods of arriving at the average annual earnings of the injured employer cannot "reasonably and fairly be applied." 33 U.S.C. §10(c). Section 10(c) applies because claimant worked fewer than 33 weeks in the year prior to the injury.

It is permissible for an ALJ to average a claimant's annual earnings during several years prior to the industrial injury to establish the average weekly wage under Section 10(c). Hall v. Consolidated Equipment Systems, Inc., 139 F.3d 1025 (5th Cir. 1998). The ALJ has the option of considering the earnings during the year prior to the industrial injury and

looking at historic earnings. See Anderson v Todd Shipyards, 13 BRBS 593 (1981).

In the present case, based on his prior earnings, and divided by 52, the Employer and Carrier have calculated claimant's average weekly wage to be \$207.94. (EX 18.223; 19.227). Claimant earned a total of \$10,813.01 in the year prior to the alleged accident. (EX 18.223).

This is a fair estimation of claimant's post-injury earning capacity in that, as claimant testified, he has never worked more than nine months out of any year. (TR. 70). There is no evidence in the record establishing that this trend would not have continued.

At the hearing, the undersigned asked the following

Mr. Condon, what do you think the average weekly wage is?

MR. CONDON: Our position is that it is \$652.50 based on 10C.

JUDGE MALAMPHY: Mr. Warns?

MR. WARNS: \$207.94 based upon Section 10C, and the earnings during the year prior to the injury divided by 52 is the basis. (TR 6).

The parties have agreed that Section 10(c) rather than 10(a) or (b) is appropriate in this case.

The undersigned would note that the record does not reflect Nitschke's dates of employment with the foundry or when he started working for Coastal. The break between the two jobs has been reported to be about six months and was due to a voluntary decision of the Claimant.

In this case only CX13 gives any guidance as to the earnings. There are pay slips from Coastal which indicate that he worked from about October 15, 1989 through January 28, 1990. Nitschke earned \$9,135.00 in 14 weeks of work for an average of \$652.50 per week.

The Employer points out that Nitschke earned \$10,813.01 in 1989 or an average of \$207.94 per week. However, the Employer's

calculation does not take notice of Nitschke's significant earnings in January 2000. Moreover, we do not know Nitschke's earnings in the foundry in January 1989 as there are no pay slips from that firm in the record.

In Harrison v. Todd Pacific Shipyards Corporation, 21 BRBS 339 (1988), the BRB stated that

Although employer contends that the administrative law judge should have used only the minimum wage rate in view of claimant's earnings history and short-term employment with employer, its argument neglects that the administrative law judge relied upon claimant's "good fortune" in obtaining a higher paying job with employer in 1982. See generally Bonner v. National Steel & Shipbuilding Co., 5 BRBS 290 (1977), aff'd in part. Part, 600 F.2d 1288 (9th Cir. 1979); Le v. Sioux City & New Orleans Terminal Corp., 18 BRBS 175 (1986). Thus, the administrative law judge reasonably relied upon an average annual earnings figure which is higher than that which was previously enjoyed by claimant. See generally Bonner, supra, 600 F.2d at 1288. We accordingly affirm the administrative law judge's computation of claimant's average weekly wage-earning capacity at the time of the injury pursuant to Section 10(c).

In Le v. Sioux City and New Orleans Terminal Corporation, 18 BRBS 175 (1986), the BRB reported that the Board and federal courts have stated that 10(c) is the proper provision for calculating average weekly wage when claimant has received an increase in salary shortly before his injury.

Based on Harrison and Le, the undersigned finds that the applicable AWW is \$652.50.

Date of Maximum Medical Improvement (MMI)

The Claimant contends that he has not reached MMI, and the Employer relies on the date of May 22, 1991 given by Dr. Mandt.

Dr. Mandt performed surgery on each knee in late November 1990. In early February 1991, this physician recommended physical therapy for one more month. Dr. Mandt noted that Nitschke was seeing Dr. O'Neill for other problems. On May 15, 1991, Dr. Mandt reported that the condition was stable and that no further treatment was indicated. The physician confirmed this treatment note in a letter later that month.

Dr. O'Neill's records start in January 1991 and continue into 2001. On examination on May 16, 1991, the physician noted good mobility of the knees but there was right iliotibial band tenderness and contracture.

In October 1991, Dr. O'Neill stated that she had reviewed Dr. Levine's evaluation in August and agreed that there was no primary mechanical defect that impeded the knees.

Dr. O'Neill has repeatedly stated that Nitschke has pain in his knees and in various other parts of his body. However, the reports indicate that knee impairment has been at the same level as that demonstrated in mid May 1991.

Therefore, I conclude that Nitschke reached MMI on May 15, 1991.

Authorized Treating Physician

The Act provides as follows:

Sec. 7 (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

Under Section 7(c)(2)

An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

Section (d) (1) provides that

An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless

- (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsection (b) and (C) and the applicable regulations.

Dr. Mandt was selected as the treating physician and physical therapy was provided during such treatment. There is no indication that Dr. Mandt refused to provide care after May 1991.

The record suggests that Nitschke was referred to Dr. O'Neill by his former counsel. Dr. Mandt did not refer Nitschke to Dr. O'Neill for treatment and Dr. O'Neill does not contend otherwise.

Nitschke did not contact the Employer or the District Director about a change in physicians for some ten years after the knee surgery. Dr. Mandt was providing necessary treatment, and in the absence of a request for a change of physicians, treatment by Dr. O'Neill does not meet the criteria for payment under Section 7 of the Act.

Nature and Extent of Disability

Based on Dr. Levine's opinion in 1991, the Claimant was not paid a scheduled rating for either knee. However, based on the examination by Dr. Brooks in 2001, the Employer agreed to pay a 5% rating for each knee.

Nitschke has complained of problems in numerous parts of his body due to the fall in 1990. The record clearly indicates that his knees were injured at that time. Nitschke reported back and neck complaints to Drs. Mandt and O'Neill and informed Dr. Levine that he also had problems with his thighs and feet. Examinations in 1991 did not reveal objective orthopedic findings relating to areas other than the knees.

Nitschke has psychological disorders that have affected him throughout his life. These can not be attributed to the injury or considered to have been aggravated by events in January 1990.

ORDER

1. Nitschke is entitled to temporary total disability from January 25, 1990 until May 22, 1991, pursuant to the stipulations.
2. The Employer is to pay a 5% permanent partial disability rating for each knee based on an AWW of \$652.50.

3. Treatment by Dr. O'Neill is not authorized under the Longshore Act and the Employer is not responsible for associated medical bills.
4. Section 8(f) relief is moot at this time as the Claimant has not been awarded permanent unscheduled compensation.
5. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).
6. Employer shall receive a credit for all compensation that has been paid.
7. All computations are subject to verification by the District Director.
8. Pursuant to Section 7 of the Act, the Employer shall pay for all authorized medical treatment for Claimant's work related knee impairments.
9. Claimant's attorney, within 20 days of the receipt of this order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia